United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

145

with affidavit

75-6013

To be argued by
FREDERICK P. SCHAFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6013

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

LEONE BOSURGI and EMILIO BOSURGI, As Executors of the Estate of ADRIANA BOSURGI, Deceased, CHEMICAL BANK, As Statutory Executor of the Estate of ADRIANA BOSURGI, Deceased, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and BENEDICT GINSBERG,

Defendants-Appellees,

—*and*—

Estate of ADRIANA BOSURGI, Deceased, and W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

—*and*—

CHEMICAL BANK,

Third-Party Plaintiff,

—*against*—

LEONE BOSURGI and EMILIO BOSURGI, Individually, As Executors of the Estate of ADRIANA BOSURGI, Deceased, As Trustees of a Trust for the Benefit of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, As Agents of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES and As Agents of W. SANDERSON & SONS, Estate of ADRIANA BOSURGI, Deceased, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,

Third-Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE PLAINTIFF-APPELLANT

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REPLY BRIEF FOR THE PLAINTIFF-APPELLANT

POINT I

The $215,000 settlement fund is clearly the proper subject of the United States' efforts to foreclose its tax liens against the Bosurgis.

Both SAICI and Ginsberg take issue with the United States' characterization of the $215,000 fund upon which it seeks to foreclose its tax lien as the "proceeds" of Adriana Bosurgi's securities account. SAICI even goes so far as to claim that "of controlling importance is the indisputable fact that the *settlement proceeds* were not assets, either directly or indirectly derived from the estate of Adriana Bosurgi" (Brief, p. 27). SAICI also places great emphasis on the fact that at some time after the death of Adriana Bosurgi, the value of that account was reduced to zero and that thus "there were no securities, funds or income for that matter, then in existence against or upon which *any estate tax claim* or *any other tax claim* involving the mother, Adriana Bosurgi, could have been asserted" (Brief, p. 4). These arguments evidence a misunderstanding by SAICI and Ginsberg of both the factual and legal nature of this tax action.

In the first place, there is no real question that the $215,000 settlement fund is directly traceable to the custodian account of Adriana Bosurgi. That account was opened by her on May 13, 1954, and she was its registered owner at the time of her death on March 27, 1963.* Thereafter, the account was transferred to her sons who in 1966 commenced a state court action against Chemical Bank

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* Ginsberg incorrectly states that there "never was any such thing as an 'Adriana Bosurgi's securities account,'" because the account had been in the "joint names of 'Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi', and the sons were "co-owners" (Brief, pp. 13-14). In fact, the account was in the single name of Adriana Bosurgi, and she was the sole owner. Her sons only had power of attorney (A. 290-292; Chemical Bank's Brief, p. 2).

alleging Chemical Bank's conversion of the securities contained therein and its negligent and fraudulent mismanagement of that account (A. 431-447). The $215,000 fund upon which the United States seeks to foreclose in this action was created in settlement of that state court suit. In light of these facts, it is difficult to comprehend SAICI's argument that these settlement proceeds are not directly or indirectly derived from the estate of Adriana Bosurgi. Indeed, if SAICI were correct, one is left to wonder what could be the basis for SAICI's claim to these funds, since the gravamen of its state court action against the Bosurgis was that the fund belonged to SAICI because the custodian account of Adriana Bosurgi was maintained in trust for SAICI (A. 393-398).

More importantly, the source of the $215,000 fund is irrelevant to this tax collection action. The liability of all defendants as statutory executors under Sections 2002 and 2203 and of defendants Leone and Emilio Bosurgi as transferees under Section 6901(a)(1)(A)(ii) is a personal liability. As a result of the failure of defendants to pay that tax liability after notice of the assessment and demand for payment was made on March 2, 1971, there arose a lien in the amount of that liability in favor of the United States upon all property or rights to property of defendants. Section 6321. It is therefore irrelevant whether the $215,000 is regarded as derived from Adriana Bosurgi's custodian account. It is similarly irrelevant that at some time after her death the value of the account was reduced to zero. The only issue in this case and upon which the estate tax liability hinges, is that of who owned the securities account at the date of Adriana Bosurgi's death. If, as the United States contends, the undisputed documentary evidence establishes that SAICI did not own the securities account, it follows not only that the Bosurgis and Chemical Bank are liable for the estate tax, but also that the Bosurgis have a right to the $215,000

fund pursuant to the settlement of its state court action and that the United States may therefore foreclose its tax lien on that fund.

POINT II

SAICI's financial statements established that SAICI did not own the securities account or the $215,000 fund or at the least raised a genuine issue as to SAICI's claim of ownership.

In a singularly important omission, defendants-appellees make no mention anywhere in their Briefs of the undisputed financial records of SAICI submitted by the United States in support of its motion for summary judgment. As previously noted in Point I of the United States' Brief, these undisputed financial records establish conclusively that SAICI did not own the securities account or the $215,000 fund and that the United States was therefore entitled to prevail on its motion for summary judgment. Defendants-Appellees do not advance a single argument against this inference from the undisputed facts contained in SAICI's own financial records.

Instead, SAICI simply reasserts its contention that the documents submitted in support of its motion for summary judgment show that SAICI was the owner of the securities account and the $215,000 fund (Brief, pp. 29-32). However, for the reasons set forth at pp. 34-36 of the United States' Brief, this material was neither probative of SAICI's claim nor admissible. SAICI's only response is that Ginsberg's "admissions of facts" as to the authenticity of SAICI's documents is binding on the Bosurgis (Brief, p. 36). There are three obvious flaws in this argument. First, Ginsberg's "admissions" were made in his affidavit on a motion for summary judgment, and Rule 56(e) of the Federal Rules of Civil Procedure requires such an affidavit to be made on personal knowledge. While Gins-

berg's "admissions" may be binding on his clients, they are not binding on the United States in the absence of an affidavit on personal knowledge which properly authenticates the documents submitted by SAICI. Second, Ginsberg's "admissions" are also inadequate authentication because they do not establish that the purported trust agreement and letters between SAICI and the Bosurgis were executed at or about the time indicated. Third, and most importantly, there has been no showing or "admission" of any kind that the transactions contemplated therein ever took place, or that of the date of Adriana Bosurgi's death, SAICI had any interest in the securities account. In the absence of evidence of such facts, the purported trust agreement and letters, even if authentic, have no probative value.

Even if some weight could properly be given to the material submitted by SAICI in support of its motion for summary judgment, SAICI advances no reasons why its financial statements do not at least create a genuine issue as to its claim of ownership, since the purported trust agreement is entirely inconsistent with those financial records and was allegedly entered into several months after the opening of the securities account by Adriana Bosurgi. Thus, as demonstrated in Point III of the United States' Brief, even if the United States is not entitled to summary judgment dismissing SAICI's claim, the judgment of the Court below granting SAICI's motion for summary judgment must be reversed and remanded.

POINT III

SAICI is estopped from asserting that Adriana Bosurgi did not own the securities account.

Similarly, defendants-appellees completely fail to address the argument in Point II of the United States' Brief that the United States was entitled to prevail on its mo-

tion for summary judgment to dismiss the claim of SAICI because the income tax benefit conferred on Adriana Bosurgi estops SAICI from asserting that she did not own the securities account. SAICI's only reference to this point, although an indirect one, is to complain of the tax assessments and notice of levy made upon SAICI on May 2, 1975 in the amount of $140,466.00, for the unpaid income tax due on the dividends earned from the custodian account for each of the years ending December 31, 1954 through and including December 31, 1964 (Brief, pp. 48-50). SAICI thus attempts not only to assert an interest which would defeat the United States's claim against the Bosurgis for estate taxes, but also now urges to this Court that there is no basis for an alternative income tax claim against SAICI. While the latter issue is not before this Court, SAICI's argument highlights why SAICI should be estopped from asserting that Adriana Bosurgi did not own the securities account.

If SAICI's alleged ownership of the account had been known at the time, Chemical Bank would have had to withhold and pay to the United States for each year an income tax on the dividends at the rate of 30% rather than 15%, and if the taxes had not been paid, there would have been sufficient property upon which the United States could have levied to satisfy its tax liens. The United States would then not have had the burden and uncertainty of collecting those taxes. Instead, as a result of the representations of Adriana Bosurgi, SAICI's alleged trustee, that she owned the account, the United States will now apparently be required to litigate with SAICI for the unpaid balance on the income taxes if the decision of the Court below is affirmed. Even after the United States obtained a judgment against SAICI for these taxes, there would be a serious collection problem, since if Ginsberg is awarded the fees he claims in this action, the remaining money in the $215,000 fund would be insufficient to satisfy SAICI's tax liability, and SAICI appears to have no other assets in this country. In short, the United States

has clearly been prejudiced by Adriana Bosurgi's representations that she owned the account, and thus SAICI, which claims to have been in privity with her, is estopped from now claiming that it owns the securities account.

POINT IV

The factual determinations of the State Court as to the ownership of the $215,000 fund and the amount of Ginsberg's lien were void for lack of subject matter jurisdiction.

Before the state court's findings as to the $215,000 fund and Ginsberg's application for the fixing of his fee could be given any weight, it must be shown that the state court had jurisdiction to make such determinations. The arguments of defendants-appellees as to why the state court did have such jurisdiction are all without merit.

First, SAICI concedes that it never obtained *in rem* jurisdiction over the settlement proceeds, but suggests that personal jurisdiction over the Bosurgis, obtained by their appearance and answer, was sufficient to give the state court jurisdiction to determine SAICI's claim to the $215,000 fund (Brief, p. 19).* However, this argument ignores the fact that prior to the commencement of SAICI's state court action, the federal court had obtained jurisdiction of the *res* and appointed a federal guardian, thereby precluding the state court from adjudicating any interests in the settlement fund. See Point IV A. and B. of the

* SAICI also argues that the Government's assumption that SAICI's case depended on its obtaining *in rem* jurisdiction was based "upon the erroneous belief that the action was commenced through attachment of the settlement proceeds" (Brief, p. 19). This statement completely misconstrues the United States' argument, for its Brief states clearly that SAICI never did obtain an attachment of the settlement proceeds, and indeed could not because the federal court had acquired jurisdiction of the *res* and appointed a federal custodian.

United States' Brief. SAICI's only response to this is to suggest indirectly that the federal court's *in rem* jurisdiction may have been defective because "[t]he fund and securities constituting the settlement proceeds did not mature into a discernible *res*, until after the entry of final judgment in the state court action pursuant to the aforesaid Appellate Division decision and order" (Brief, p. 46). This argument is sheer nonsense. The settlement fund became a discernible *res* at the time of the oral stipulation of settlement in the state court action between Chemical Bank and the Bosurgis, and the federal court obtained valid and exclusive jurisdiction over that *res* when, pursuant to Judge Bonsal's March 18, 1971 order, Chemical Bank delivered the $215,000 fund to Ginsberg as custodian for the federal court.

Second, SAICI contends that its action asserting a claim to the $215,000 fund "could only have been brought in the New York State Supreme Court before Mr. Justice Kapelman" because only he could "finalize the admittedly 'tentative settlement' and the admittedly 'still pending' and undetermined action" before him (Brief, pp. 17-18). This argument misinterprets the nature of SAICI's state court action. That action was not in any sense one to "finalize" the previous oral settlement between the Bosurgis and Chemical Bank. Rather, it was one to assert SAICI's claim to the proceeds of that settlement. There was therefore no reason why the federal court could not have adjudicated SAICI's claim. On the contrary, since the federal court had jurisdiction over those proceeds, it was the *only* court which could adjudicate such claim.

Similarly there is no merit to Ginsberg's unsupported assertion that "[t]he State Court, undoubtedly had jurisdiction of a fund created as the result of an action in that Court, as would any Court in which an action had been instituted and prosecuted to completion" (Brief, p. 23). Although the $215,000 fund was created as a result of the

settlement of the state court action, it was paid to Ginsberg by Chemical Bank and thereafter held by Ginsberg pursuant to Judge Bonsal's March 18, 1971 order. Thus, it was the federal court not the state court which had jurisdiction over the fund, and the state court therefore lacked the power not only to adjudicate SAICI's claim but also to award Ginsberg an attorney's fee.*

Third, Ginsberg argues that Judge Bonsal's March 18, 1971 order did not stay further state court proceedings as to the settlement fund (Brief, pp. 17-19). The United States has previously shown that Judge Bonsal's rejection of Ginsberg's proposed order made clear that any such further state court proceedings were prohibited (Brief, pp. 9-10). In any event, whether Judge Bonsal's order is interpreted to contain such a prohibition or not, the critical fact is that pursuant to that order the federal court obtained jurisdiction over the fund, and thus any further attempt by the state court to adjudicate interests in it were void.

Fourth, SAICI cites this Court's decision in *Vernitron Corp.* v. *Benjamin*, 440 F.2d 105 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971) in support of its contention that the state court did have jurisdiction to adjudicate its claim to the $215,000 fund. In *Vernitron*, three days before the return date of plaintiff's motion for summary judgment in a state court contract action, defendant began a separate action involving the same transaction in federal court and obtained a federal court injunction of the state court

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* Ginsberg states that prior to this appeal the Government never suggested that it was only the federal court, and not the state court, that had jurisdiction to fix his fee (Brief, p. 18). In fact, in his letter of November 12, 1971, Assistant United States Attorney Michael I. Saltzman pointed out that the federal court had jurisdiction over the fund, that the "reasonableness" of an attorney's fee under Section 6323(b)(8) was a federal question, and that even if the state court were to allow Ginsberg his fee, the issue would have to be relitigated in the federal court (A. 320-321).

proceedings. This Court held that it was improper for the District Court to enjoin the state court under the "necessary in aid" exception to the anti-injunction statute, 28 U.S.C. § 2283, merely because the state court might decide factual issues and thereby collaterally estop a party from litigating those issues again in the federal action.

The *Vernitron* case is clearly distinguishable from this one. First, in *Vernitron* the parties were the same in the state and federal actions. Here the United States was not a party in the state court action. Thus, there can be no collateral estoppel against the United States as to issues decided in the state court in its absence. Second, in *Vernitron* both the state court and the federal court had jurisdiction over their respective actions. Here the state court lacked jurisdiction because the federal court obtained jurisdiction over the *res* first. In addition, *Vernitron* did not involve a state court determination of facts underlying a tax assessment, whereas here the tax assessment of the United States depended upon Adriana Bosurgi's ownership of the securities account. As shown in Point IV C. of the United States' Brief, the state court also lacked jurisdiction to adjudicate the issue of ownership of the fund because such an adjudication would involve an inquiry into the merits of a tax assessment. Such an inquiry may be undertaken only by a federal court in a refund action brought by the taxpayer under Section 7422 or an action brought by the United States to recover judgment against the taxpayer and to foreclose on property under Section 7403. Except in such plenary suits in the federal courts, a tax assessment has the force and effect of a judgment. There is nothing in the holding of *Vernitron* which in any way weakens this principle. Thus, the state court did not determine an issue of fact "competently before it" (SAICI's Brief, p. 29, quoting from the Appellate Division's order, A. 194).

POINT V

The State Court factual findings, even if not void, could not affect the United States' tax claim that the securities account belonged to Adriana Bosurgi.

A. The Appellate Division Held that Its Factual Determination Would Not Affect the Federal Tax Liens:

Defendants-appellees completely ignore the fact that the Appellate Division's order, upon which they place such reliance, specifically provided, contrary to their present contentions, that the federal tax liens are not affected by its factual determinations (A. 194). Indeed, Ginsberg quite inexplicably accuses the United States of lack of candor for failing even to acknowledge that Justice Kapelman's decision was reversed by the Appellate Division (Brief, pp. 32-33). In fact, the Appellate Division's order is described in its proper chronological place in the United States' Statement of the Case and thereafter is discussed further in connection with the above-captioned argument (Brief, pp. 25, 51-52).

B. The District Court's Reliance on the *Bosch* Case was Erroneous:

SAICI relies primarily on the cases of *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967) and *Cheng Yih-Chun* v. *Federal Reserve Bank of New York*, 442 F.2d 460 (2d Cir. 1971) for its contention that the District Court was correct in giving "proper regard" to the uncontested state court finding of fact that SAICI was the owner of the $215,000 fund. As demonstrated in the United States' analysis of those cases in Point V B. of its Brief, such reliance is entirely misplaced. Both *Bosch* and *Cheng Yih-Chun* involved the weight to be given by a federal court

to state court rulings of law concerning the characterization of a property interest based on undisputed facts. There is nothing in the holding or rationale of those decisions to suggest that a federal court should give any weight to a state court's factual findings in an action to which the United States was not a party. On the contrary, the Supreme Court's reasoning in *Bosch* was based on an analogy to the law in diversity cases, and its language makes clear that its holding was limited to a state court determination of "an underlying issue of state law." 387 U.S. at 465.

C. The United States Made a Sufficient Showing of Collusion to Warrant a Full Inquiry Into That Issue Before Any Regard Could Be Given to the State Court Proceedings:

Since so much of the Briefs of SAICI and Ginsberg are taken up with their efforts to show that the state court proceedings were truly adversary in nature, two points must be made at the outset concerning this issue. First, this Court need address itself to the question of collusion only if it holds that the state court had jurisdiction over SAICI's claim to the fund and Ginsberg's application for an attorney's fee and that the *Bosch* doctrine of "proper regard" was correctly applied to the state court's findings of fact. If, as shown above, the District Court should not have given any weight to the state court's findings for either or both of these reasons, and if, as the District Court held, the United States could not be deemed to have been a party to the state court proceedings, this Court need not reach the question of collusion, since in any event the decision below would have to be reversed and the question of collusion would be moot.

Second, the burden on appeal rests upon the defendants-appellees to demonstrate that there is no genuine issue of material fact as to the question of collusion. Unlike the situation in *Flitcroft* v. *C.I.R.*, 328 F.2d 449 (9th Cir.

1964), where a trial was held, here defendants-appellees were granted summary judgment while the United States was denied discovery of them on this issue. Thus, if any reasonable inference can be drawn from the facts before the District Court, viewed in the light most favorable to the United States, that the state court proceedings were collusive, the decision of the District Court must be reversed and the case remanded for an inquiry into this matter.

The United States has already indicated in its Brief (pp. 58-61) the undisputed elements of possible collusion and need not repeat them here. That these facts warrant a full inquiry into this question is perhaps best demonstrated in the first instance by the way in which Ginsberg has had to go outside the record on appeal to rebut the inference of collusion. Thus, to explain the contradiction between his answer on behalf of the Bosurgis and their response to SAICI's motion for summary judgment, Ginsberg alleges that he filed a verified answer to SAICI's complaint before having received authority to appear for the Bosurgis and without consulting with them as to the underlying factual allegations (Brief, pp. 20-22, 28-30). Not only is this explanation based on allegations of fact and motivation that are outside of the record, it is also insufficient to rebut the inference of collusion raised by the apparent turnabout in the Bosurgis' position.

In the first place, it is surprising that Ginsberg would appear in a case on behalf of a party from whom he had not yet received authority to make such an appearance.* Under New York law such an appearance is ineffective in establishing jurisdiction over out-of-state residents who

* Ginsberg criticizes the Government for misquoting his June 10, 1971 letter to Justice Kapelman concerning his then lack of authority to represent the Bosurgis (Brief, p. 19). A comparison between the quotation from that letter in the United States' Brief (p. 14) and a copy of the letter itself (A. 356) shows that there was no such misquotation.

are not served with process. *Amusement Securities Corp.* v. *Academy Pictures Distributing Corp.*, 21 App. Div. 227 (1st Dept., 1937), *aff'd*, 277 N.Y. 557 (1938). Ginsberg attempts to explain this unusual action on the grounds that he appeared to protect his "clients" from the danger of a default judgment in the event that SAICI obtained jurisdiction over the fund in his possession by obtaining a warrant of attachment. However, at the time Ginsberg received a copy of SAICI's complaint, there was pending before the federal court his motion to vacate the service of Chemical Bank's third-party complaint upon the Bosurgis on the ground that the action against Chemical Bank in the state court was no longer "pending" and that Ginsberg was therefore not a person authorized to accept service on behalf of the Bosurgis. One is left to wonder, then, on what the alleged attorney-client relationship between Ginsberg and the Bosurgis was based. Furthermore, the supposed threat to the Bosurgis' interest was clearly illusory, for the fund in Ginsberg's possession was subject to the jurisdiction of the federal court and therefore not subject to a state court warrant of attachment. In addition, Ginsberg could just as easily have prevented the possibility of a default judgment by obtaining a stipulation from SAICI's counsel extending the Bosurgis' time to answer the complaint. Finally, if Ginsberg's concern had been to protect his "clients" against a default judgment, why did he not also appear on their behalf in the federal court action, since there the court already had not only jurisdiction over the fund, but personal jurisdiction over the Bosurgis, and in fact a default judgment was eventually entered (A. 122-129).

It is equally surprising that Ginsberg would have filed a verified answer on behalf of the Bosurgis in the state court action without even discussing SAICI's allegations with them. Ginsberg seeks to justify this action by stating erroneously that except for the admissions as to the residence of the Bosurgis, the fact that Adriana Bosurgi was

their mother and that she died in Italy on or about March 27, 1963, and the existence of the Bosurgis' action against Chemical Bank, his verified answer denied knowledge and information sufficient to form a belief "as to every other allegation of the complaint" (Brief, p. 21). In fact, ¶ 6 of his answer denied the central factual allegations of SAICI's complaint, *i.e.*, that it owned the fund and that the Bosurgis had no interest in it, "except that such denial by the defendant Ginsberg is on information and belief" (A. 410). This last qualification does not in any way release Ginsberg from the obligation to have conferred with his "clients," for its language suggests that the denial on behalf of the Bosurgis was unqualified, and therefore on personal knowledge. Moreover, even a denial upon information and belief must be based on some reasonable grounds. Although Ginsberg failed to comply with its terms, CPLR § 3021 requires that if a verification "is made by a person other than the party, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge." In the absence of a basis for his knowledge or grounds for his belief, an attorney's verification is insufficient. *Emspak* v. *Conroy,* 192 Misc. 637 (Sup. Ct., Queens Cty., 1948).

Ginsberg must resort to explanations that are based on motivations outside of the record to rebut the inference of collusion raised by other undisputed facts, and these explanations are similarly unpersuasive. As previously noted, in his affidavits dated October 20, 1971 (A. 459-463) and October 12, 1973 (A. 150-162), Ginsberg stated that on August 12, 1971 he conferred with the Bosurgis concerning SAICI's motion for summary judgment whereas that motion was not made until October 12, 1971. Ginsberg asserts that this error was "probably" based on his belief prior to the August 5, 1971 letter (A. 428), "that if the documents [received from SAICI] were authentic, and if SAICI had not been paid, there could be no defense to summary judgment" (Brief, p. 27). This

does not explain how Ginsberg knew there was going to be a motion for summary judgment or why he assumed there would be one before he had responded to SAICI's request to authenticate the documents. In view of the fact that Ginsberg twice made reference in sworn affidavits suggesting that he may have known in advance what SAICI was going to do, there is at least a reasonable inference of collusion to justify a further inquiry.*

Ginsberg also contends that the Bosurgis' appearance in the state action and refusal to appear in the federal action was not because they wished to litigate the question of Adriana Bosurgi's ownership of the securities account with SAICI rather than the United States, but because unlike the situation in the state court proceeding, there was no threat of attachment of the fund by the federal court and the size of the United States' claim was several times that of the fund (Brief, p. 31). This argument has no merit. There was no suggestion of attachment in the federal action because the federal court already had jurisdiction over the fund, and for that reason the threat of attachment by the state court was illusory. Since the federal court also had personal jurisdiction over the Bosurgis, their non-appearance could hardly have been because they wished to avoid personal liability in excess of the fund, since that could have been accomplished by a default judgment for the full amount of their tax liability. Moreover, as of August 12, 1971, when he conferred with the Bosurgis, Ginsberg was aware of a defense, based on allegedly authentic documents, which could defeat the entire tax claim of the United States. In view of these facts, it is a reason-

* The United States also pointed to the discrepancy between Ginsberg's September 14, 1971 letter (A. 430) in which he states he spoke to just Leone Bosurgi and his October 20, 1971 affidavit (A. 459) in which he states he spoke to both Bosurgi brothers on August 12, 1971 (Brief, pp. 18, 36). Ginsberg's only response is to accuse the Government of incorrectly enclosing the word "just" in the quotation from his letter to give the impression that it was quoting from his letter. This accusation is incorrect, as a glance at p. 18 of the United States' Brief will show.

able inference from the refusal of the Bosurgis to appear in the federal action that they preferred to litigate the question of Adriana Bosurgi's ownership of the securities account in the state court in order to obtain an uncontested factual finding, *ex parte* the United States, which would defeat the tax claim.

Similarly without merit is Ginsberg's response to the inference of collusion raised by the fact that Ginsberg resisted the service on the Bosurgis in the federal action of Chemical Bank's third-party complaint, but voluntarily appeared on behalf of the Bosurgis in the state action brought by SAICI after SAICI's attorney had written to request that Ginsberg enter into a stipulation conferring subject matter jurisdiction over the *res*. Ginsberg suggests that if his argument before Judge Lasker that the state court action was no longer pending had been accepted, then the federal court would have been the only forum for the fixing of his fee, and thus "SAICI could not have succeeded in accomplishing what plaintiff-appellant contends they accomplished" (Brief, p. 34). This argument is disingenuous and fallacious. Ginsberg's contention that the state court action between the Bosurgis and Chemical Bank was no longer pending was made in support of his motion to vacate service upon the Bosurgis in the federal action of Chemical Bank's third-party complaint. The purpose of that motion was to prevent the federal court from obtaining personal jurisdiction over the Bosurgis. If that effort had been successful, it might have prevented the enforcement by the United States of its tax claim against the Bosurgis, thereby allowing them to avoid litigating with the United States the question of Adriana Bosurgi's ownership of the custodian account. In addition, a federal court ruling that the state court action was no longer pending would not in any way have prevented SAICI from proceeding with its action, for SAICI never attempted to obtain jurisdiction over the Bosurgis by service of process on Ginsberg pursuant to CPLR § 303. Rather, SAICI

contemplated obtaining subject matter jurisdiction by "a simple stipulation" between itself and Ginsberg in lieu of a warrant of attachment of the $215,000 fund (A. 387). Thereafter, Ginsberg appeared and filed a verified answer on behalf of the Bosurgis.*

Both Ginsberg and SAICI also take issue with the Government's characterization of the state court's factual finding that SAICI owned the $215,000 fund as "uncontested." Ginsberg argues that if it had been uncontested, he would not have been required to appeal from Justice Kapelman's first decision and would have received as his fee on remand the sum fixed in the pre-litigation retainer (Brief, pp. 15-16). Similarly, SAICI points out that there was some dispute between it, Chemical Bank, and Ginsberg as to the consolidation of the two state court actions and as to the amount of Ginsberg's lien (Brief, pp. 20-21). Both Ginsberg and SAICI ignore the central fact that there was no objection to SAICI's claim of ownership of the $215,000, and that the appeal from Justice Kapelman's denial of SAICI's motion for summary judgment was required because of his holding that the federal tax action prevented his determination of SAICI's claim (A. 370-373). Thus, the state court's finding that SAICI owned the $215,000 was quite clearly uncontested. It is irrelevant that the amount of Ginsberg's fee was contested by SAICI, since the allegations of possible collusion by the United States are directed at the attempts by SAICI and the

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* Ginsberg accuses the United States of dishonesty in citing page A. 387 "as justification for its observation at page 43 [of its Brief], concerning SAICI's obtaining jurisdiction by a 'simple stipulation between SAICI and Ginsberg'" (Brief pp. 34-35). As with all of Ginsberg's claims of "misstatements" by the United States, this one is erroneous. As Ginsberg points out, p. A. 387 contains a letter from SAICI's counsel to him requesting a stipulation between them concerning Ginsberg's authority to accept process and the disposition of the funds in escrow along the lines of the proposed attachment order. Since at p. 43 of its Brief the United States states only that SAICI "hoped to secure subject matter jurisdiction over the *res* by a 'simple stipulation' between SAICI and Ginsberg (A. 387)," the United States' citation to that letter is entirely appropriate.

Bosurgis to circumvent the federal tax claims rather than the amount of Ginsberg's fee.

Finally, there remains the question of who controls SAICI. SAICI states that its counsel had previously provided the United States with a document tending to show that Adriana Bosurgi and her sons did not found SAICI, never attended any of its meetings, and never occupied any office of director nor discharged any executive office, and that the Government never responded with any documents concerning the accuracy of this information (Brief, pp. 34-35). Even if true,* this information is in no way dispositive of the question of the Bosurgis' control of SAICI. Furthermore, SAICI states several times that the Government's allegations that the Bosurgis may control SAICI were made "without documentary proof" (Brief, pp. 34, 39). What SAICI overlooks, however, is that the United States was denied discovery of SAICI in order to explore this question. Moreover, SAICI fails to respond to the United States' statement (Brief, p. 61) that an investigative report indicates that in 1961 SAICI's stock was wholly owned by Adriana, Leone, and Emilio Bosurgi.**

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* Although the document referred to by SAICI is quoted in part in a affidavit of SAICI's counsel which is included in the Appendix (A. 236), neither the document nor the information allegedly contained therein could be considered by the Court below or by this Court, for SAICI's counsel does not purport to have any personal knowledge of these matters. Indeed, it is noteworthy that a great many of the citations to the Appendix in SAICI's Brief are to statements made in the affidavits of SAICI's counsel and of Ginsberg which have no other support in the record. Repetition hardly converts an allegation of counsel into an undisputed fact.

** The investigative report also indicates that SAICI's corporate minute books for 1963 (and possibly for other years) reflect a power of attorney to Leone Bosurgi. The United States acknowledges that this report is not part of the record on appeal, but makes reference to it in order to demonstrate that the need for further inquiry into the possibility that the Bosurgis control SAICI is based on information in the United States' possession, and is not at all speculative.

D. The United States Cannot be Deemed a Party to the State Court Proceedings:

As demonstrated in Point V B. of its Brief, the United States cannot be deemed to have been a party to SAICI's state court action, and thereby bound by its results, not only because its involvement therein was insufficient, but also because the requirements of 28 U.S.C. § 2410 were not met and thus the doctrine of sovereign immunity prevented the United States from being affected by the state court action. Defendants-appellees allege no facts and make no arguments which challenge in any way the correctness of these points.

SAICI does make much of the fact that the United States was kept aware of the developments in the state court action, as if to suggest that the United States had some obligation to make itself a party to that action or take some steps with respect thereto. However, the United States had no such obligation. Since SAICI appeared to have some interest in the fund upon which the United States sought to foreclose its tax lien, the United States joined SAICI as a defendant in the federal action, as it was required to do by Section 7403 (A. 77-83, 87). If SAICI wished to join the United States as a party to the state court action, it could have done so pursuant to 28 U.S.C. § 2410. The United States was surely not under any duty to involve itself in that action merely because of its acquaintance with those proceedings, especially since all the necessary parties were before the federal court. Furthermore, the United States took no action to have the federal court enjoin the state court action under 28 U.S.C. § 2283 for the simple reason that such an injunction was not "necessary in aid of its jurisdiction, or to protect or effectuate its judgments" because, as demonstrated above, nothing that occurred in the state court action could affect the federal court's jurisdiction or the force of its judgment. Thus, the responsibility for the delay and duplicate efforts in this matter lies not with the United States, but rather with SAICI.

CONCLUSION

For the reasons stated above it is respectfully submitted:

(A) that an order be entered

(1) reversing the Court below and granting the United States' motion for summary judgment to dismiss the claim of SAICI,

(2) reversing the Court below and reinstating the partial default judgment *in rem* against Leone and Emilio Bosurgi,

(3) reversing the Court below and remanding Ginsberg's claim for further proceedings,

(4) reversing the Court below and vacating the stay of discovery of Ginsberg, and

(5) reversing the Court below, reinstating the amended complaint, and remanding the action for further proceedings against the other named defendants, or in the alternative

(B) that an order be entered

(1) reversing the Court below and remanding SAICI's claim,

(2) reversing the Court below and vacating the stay of discovery of SAICI, and

(3) granting the relief set forth in (2), (3), (4), and (5) of (A) above.

Dated: New York, New York
September, 23, 1975

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Plaintiff-Appellant.

FREDERICK P. SCHAFFER,
Assistant United States Attorney,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

CA 75-6013

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 23rd day of Sept 1975 she served 2 copies of the within govt's reply brief (pltf appellant).

by placing the same in a properly postpaid franked envelope addressed:

1) Gainsburg, Gottlieb, Levitan & Cole, Esqs., 122 East 42nd St. NY NY 10017
2) Benedict Ginsberg, Esq., 475 Fifth Ave. NY NY 10017
3) Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, NY NY 10005

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
23rd day of Sept 1975

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977